#### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

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Employer/Respondent,

AFFIRMATION OF MARK A. MOLDENHAUER

-and-

Case No. 29-CA-090017

MILK WAGON DRIVERS AND DAIRY EMPLOYEES LOCAL 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Union/Charging Party.

MARK A. MOLDENHAUER hereby affirms the following under the penalty of perjury:

- 1. I am an attorney duly admitted to practice before the National Labor Relations Board, and am a member of the firm of Bond, Schoeneck & King, PLLC, attorneys for the Employer/Respondent Elmhurst Dairy, Inc. ("Elmhurst") in this proceeding.
- 2. On December 21, 2012, Elmhurst filed a motion for summary judgment pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board, requesting that the claims in Case No. 29-CA-090017 be deferred to the parties' contractually bargained arbitration procedure pursuant to <u>Collyer Insulated Wire</u>, 192 NLRB 837 (1971), and <u>United Technologies Corp.</u>, 268 NLRB 557 (1984), absent dismissal on the merits.
- 3. As set forth in Elmhurst's initial memorandum of law, deferral to arbitration is appropriate since: (i) Elmhurst and Milk Wagon Drivers and Dairy Employees, Local 584, International Brotherhood of Teamsters ("Local 584") have enjoyed a productive history of collective bargaining; (ii) the Complaint contains no allegations that Elmhurst bears animosity towards its employees' exercise of protected rights; (iii) Elmhurst has expressed a willingness to

arbitrate the underlying disputes (with an arbitration pending for February 26, 2013); (iv) the parties are subject to a grievance-arbitration procedure which broadly covers "grievances as to the meaning, interpretation or application of the provisions of [the 2010-2015 collective bargaining agreement between the parties (*i.e.*, the Elmhurst 2010-2015 Agreement)]"; and (v) the underlying disputes are well-suited to resolution by arbitration. (*See* Elmhurst Memorandum of Law, dated 12/21/12, pp. 11-17)<sup>1</sup>.

- 4. As to the fifth Collyer factor, the allegations in the Complaint predominately relate to Elmhurst's decision to conduct layoffs among utility employees hired prior to July 18, 2007, whom the parties have repeatedly categorized as "Existing Employees" (as distinguished from utility employees hired on or after that date, whom are categorized as "New Hires"). To resolve this and related disputes, it is necessary to examine and interpret several provisions in the Elmhurst 2010-2015 Agreement, including but not limited to: (i) the management rights provision which reserves for Elmhurst the right to "layoff;" (ii) an "Existing Employees" paragraph expressing the parties' agreement that utility employees hired prior to July 18, 2007 are subject to the terms and conditions set forth in the current labor contract between Local 584 and the Milk Industry Labor Association of New York ("MILA"), a multi-employer association to which Elmhurst belonged until 2007; and (iii) a "complete agreement" or zipper clause contained in the Elmhurst 2010-2015 Agreement.
- 5. In addition, because the "Existing Employees" paragraph of the Elmhurst 2010-2015 Agreement incorporates the terms and conditions of the MILA contract for utility employees hired before July 18, 2007 the employees affected by the layoff it is necessary to

<sup>&</sup>lt;sup>1</sup> Pleadings referenced throughout this Affirmation were previously filed with Board and are included in the docket for this case.

examine and interpret several provisions of the MILA agreement itself, particularly provisions describing terms and conditions concerning layoffs and the effects of layoff decisions.

- 6. To fully understand Elmhurst and Local 584's intentions with respect to layoff decisions that impact "existing employees," it is also necessary to examine the parties' collective bargaining history and past practices.
- 7. Interpreting collectively bargained agreements, the interrelationship of such agreements, bargaining history and past practices is within the traditional purview of an arbitrator. Parties who negotiate a grievance-arbitration procedure that gives arbitrators the authority to make such interpretations must be held to that bargain under <u>Collyer</u>, as acknowledged by the Acting General Counsel in General Counsel Memorandum 12-01, issued January 2, 2012 ("GC 12-01"). *See* GC 12-01, p.1 ("[t]he Board's doctrine of pre-arbitral deferral is principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes").
- 8. On January 4, 2013, the Acting General Counsel filed a memorandum of law opposing Elmhurst's motion, arguing that summary judgment was inappropriate because the facts underlying the Complaint are in dispute and, alternatively, because the case is not appropriate for deferral.
- 9. Elmhurst filed a reply memorandum of law on January 8, 2012 to address the Acting General Counsel's arguments against deferral. As discussed therein, the Acting General Counsel's first argument misses the mark because the purpose of the pending summary judgment motion is not to decide the underlying merits of the Complaint, but to obtain pre-arbitration deferral under Collyer.

- 10. Because no genuine dispute of fact was identified by the Acting General Counsel that would preclude deferral under relevant Board standards, Elmhurst respectfully submits arbitration is required. (*See* Elmhurst Reply Memorandum of Law, dated January 8, 2013, pp. 1-3).
- 11. The Acting General Counsel's second argument in opposition to summary judgment is also misplaced. The Acting General Counsel asserts that deferral is not appropriate because the seniority provision in the Elmhurst 2010-2015 is "clear and unambiguous" and an arbitrator is therefore not needed to interpret its meaning. This argument incorrectly assumes, however, that the referenced seniority provision exists in a vacuum, ignoring that the parties have continually agreed to adopt the terms and conditions of the MILA Agreement for "existing employees," without any exclusions concerning seniority, layoffs or the effects of layoff decisions. (*See* Elmhurst Reply Memorandum of Law, dated January 8, 2013, pp. 4-5).
- 12. The Acting General Counsel also seeks to define the scope of the parties' contractually-bargained management rights provision, arguing that it only gives Elmhurst the authority to decide "when" to conduct layoffs. This restriction cannot be garnered from the plain language of the Elmhurst 2010-2015 Agreement. Rather, Elmhurst's position is that the management rights clause also gives it the right to decide which group(s) of employees can be subject to layoff "existing employees" or "new hires" and that this interpretation is borne out by the parties' negotiating history and past practice. (*See* Elmhurst Reply Memorandum of Law, dated January 8, 2013, pp. 4-5).
- 13. It is irrelevant whose interpretation of the management rights clause is correct for purposes of Elmhurst's summary judgment motion. It is an arbitrator's function to determine the meaning of that and other provisions to which the parties have bound themselves, whether

negotiated directly or adopted by reference. The Acting General Counsel cannot preclude deferral by simply isolating a provision, construing it a certain way, and characterizing his own interpretation as "clear and unambiguous," ignoring all relevant context. Yet, this is precisely what the Acting General Counsel has done in this case, as demonstrated by a sur-reply he sought to file on or about January 14, 2013, but that was rejected by the Board, a copy of which is attached as Exhibit A.

14. In his sur-reply, the Acting General Counsel argues that Elmhurst is signatory to only one-collective bargaining agreement with Local 584, the Elmhurst 2010-2015 Agreement, and that only that agreement need be consulted when determining the terms and conditions concerning layoffs. (Exhibit A, p.2). He goes on to acknowledge that the "Existing Employees" provision negotiated by the parties incorporates the terms and of the MILA agreement for employees hired prior to July 18, 2007, but he dismisses the significance of that agreement without any explanation. Rather, the Acting General Counsel argues:

Respondent is not a signatory to the MILA Agreement. It is a signatory to the Elmhurst agreement. The Elmhurst agreement clearly states that layoff shall be determined by seniority and that seniority is calculated by hired date. Respondent attempts to cloud this issue by contending that the two collective bargaining agreements cover the same unit of employees. The MILA agreement, however, is not relevant to layoff and does not impact the clear language of the Elmhurst agreement. Because the Elmhurst agreement is unambiguous, it need not be put before an arbitrator for interpretation. (Exhibit A, pp. 2-3).

15. Thus, on one hand, the Acting General Counsel recognizes that the parties have adopted the terms and conditions of the MILA contract for "Existing Employees" but then, on the other hand, he accuses Elmhurst of trying to "cloud the issue" by referring the Board to the MILA contract as a source of the parties' right and obligations with respect to these same employees.

- 16. In reaching his ultimate conclusion that an arbitrator is not needed to interpret the parties' respective rights and obligations, the Acting General Counsel makes at least three determinations that ought to be reserved for an arbitrator. First, he determines that the "Existing Employees" provision has no significance in relation to the underlying dispute concerning layoffs, summarily dismissing this provision of the Elmhurst 2010-2015 Agreement. Second, he determines that the Elmhurst 2010-2015 is the sole source of any rights or obligations of the parties vis-à-vis bargaining unit employees, notwithstanding the unmistakable affect of the "Existing Employees" provision contained therein. Third, he declares the MILA Agreement to be irrelevant to the layoff decision, again disregarding the parties' agreement that the MILA terms and conditions would apply to utility employees hired prior to July 18, 2007.
- 17. It is contrary to the basic <u>Collyer</u> principles for the Acting General Counsel to assume the role of an arbitrator and make judgments about the meaning and relevance of the applicable collective bargaining agreements. Yet, his rejected sur-reply memorandum shows that this is precisely what he has done in order to fashion an argument against deferral.
- 18. The Acting General Counsel's remaining assertion against deferral is that the parties' collective bargaining agreements do not contain any language concerning continuation of health care coverage under COBRA, and Elmhurst's unilateral extension of health benefits is "intertwined" and "inextricably linked" with the layoff decision. Once again, however, the Acting General Counsel proffers this argument only after examining the parties' bargaining history and making preliminary judgments concerning the same, which are functions properly reserved for an arbitrator. Elmhurst has presented Region 29 information concerning its offer of the post-layoff benefit to Local 584 representatives and the parties' subsequent communications

<sup>&</sup>lt;sup>2</sup> Little doubt that Local 584 would disagree with this assessment to the extent the MILA Agreement grants "Existing Employees" more favorable wages, benefits and other terms and conditions of employment relative to "New Hires."

concerning the proposal. An arbitrator is capable of assessing this contextual information to determine if the parties agreed to an extension of health care benefits or if, given the opportunity to negotiate, Local 584 declined and chose to accept the Elmhurst's initial proposal.

- 19. Moreover, Local 584 filed a grievance concerning the extension of health insurance benefits to laid-off employees, thereby acknowledging that this issue also centers on "the meaning, interpretation or application of the provisions of [the Elmhurst 2010-2015 Agreement]" so as to warrant arbitration. (*See* Affirmation of Robert A. Doren, Exh. Q. This follows Local 584's premature demand to arbitrate the same issue approximately one week earlier. (*See id.*, Exh. M).
- 20. In any event, Elmhurst's layoff decision and the extension of healthcare benefits to laid off employees are not "inextricably intertwined," contrary to the Acting General Counsel's conclusory assertions. They are two entirely discreet acts. The proof concerning the layoffs will center around the meaning of the parties' agreements to have "Existing Employees" covered by the terms and conditions of the MILA labor contract, while the extension of health insurance will primarily relate to communications between the parties after the layoff decision was made and announced. The latter issue will also require an examination of whether Elmhurst even has the ability to unilaterally extend health insurance benefits, which are provided through a union trust, which is not relevant to the layoff decision itself.
- 21. The Acting General Counsel's vague assessment that the extension of COBRA benefits "flowed from Respondent's layoff of the 42 employees" fails to explain how the two claims are "inextricably linked" so as to preclude deferral. Similarly, although he contends that the two claims implicate the same proof, he fails to offer a single common issue in dispute. There is absolutely no logical or legal reason to conclude that a resolution of allegations

concerning the extension of health care benefits requires a hearing on the allegations concerning

Elmhurst's layoff decision.

22. For the reasons stated in this Affirmation, as well as those previously presented in

the Affirmation of Robert A. Doren and Elmhurst's initial memorandum of law and reply

memorandum of law, Elmhurst respectfully submits that the allegations in Case No. 090017

ought to be deferred to the parties' collectively bargained arbitration procedure.

Dated: Buffalo, New York

February 1, 2013

/s/ Mark A. Moldenhauer

Mark A. Moldenhauer, Esq.

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### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

ELMHURST DAIRY, INC.,					
	mployer/Respondent,	AFFIDAVIT OF SERVICE			
MILK WAGON DRIVERS AND DAIRY EMPLOYEES LOCAL 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,		Case No. 29-CA-090017			
U	Inion/Charging Party.				
STATE OF NEW YORK ) COUNTY OF ERIE )	ss:				
Deborah L. Ostaszewicz, being duly sworn, deposes and says that she is over 18 years of age and not a party to this action; that on the 1 <sup>st</sup> day of February, 2013, a true and accurate copy of the <i>Affirmation of Mark A. Moldenhauer</i> was electronically filed through the National Labor Relations Board's electronic filing system and that copies were served upon the following individuals by first-class mail, addressed as follows:					
James G. Paulsen Regional Director National Labor Relations Region 29 Two MetroTech Center, 5 Brooklyn, New York 112	Kahn Op Board 1 Parker Fort Lee 5th Floor Tel: (20	Stephen H. Kahn, Esq. Kahn Opton, LLP 1 Parker Plz Fort Lee, NJ 07024-2920 Tel: (201) 947-9200			
Tel: (718) 330-7700	John T. I 300 East New Yor	Driscoll Esq. Driscoll P.C. 42nd Street, 10th floor rk NY 10017 2) 599-9000			
	·	ah L. Ostaszewicz L. Ostaszewicz			
Subscribed and sworn to before me this 1 <sup>st</sup> day of February, 201	Linda M. Grand Notary Public, S	tate of New York			
/s/ Linda M. Grandinetti Notary Public		Qual. In Erie County No. 01GR4794200 Commission Expires Nov. 30, 2013			

## **EXHIBIT A**

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

**ELMHURST DAIRY, INC.** 

Respondent

and

Case No. 29-CA-090017

MILK WAGON DRIVERS AND DAIRY EMPLOYEES, LOCAL 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS Charging Party

### RESPONSE TO RESPONDENT'S REPLY TO ACTING GENERAL COUNSEL'S OPPOSITION TO SUMMARY JUDGMENT

On January 8, 2013, Respondent filed a Reply to General Counsel's Opposition to Summary Judgment. In its Reply, Respondent reiterated its argument that the allegations of the Complaint and Notice of Hearing issued in the above-captioned matter be deferred to the grievance arbitration procedure of the collective bargaining agreement between the parties. Respondent argues that there is no material dispute of fact regarding whether deferral is appropriate and that its granting of COBRA benefits to laid-off employee is not inextricably linked to the unlawful lay-off of employees. Respondent's position is without merit.

In its Reply, Respondent admits that factual disputes exist concerning the factual allegations of the Complaint, that render summary judgment (for dismissal) in appropriate. (Reply pg. 2) However,

<sup>&</sup>lt;sup>1</sup> Section 102.24 of the Board's Rules and Regulations does not provide for the filing of Replies to Acting General Counsel's Opposition to Summary Judgment. Further, Respondent filed the instant document through the Board's e-file service. It, however, sent copies to the Charging Party and Counsel for the General Counsel via regular mail. Service is therefore, improper and the motion dismissed.

Respondent takes the position that there is no dispute of any material fact relevant to deferral and, therefore, the matter should be deferred. Respondent's argument it without merit.

First, deferral is in appropriate because the contract language is clear and unambiguous. Respondent takes that position that resolution of this matter depends upon interpretations of two collective bargaining agreements. It takes the position that despite the clear language concerning layoff in the collective bargaining agreement, these portions when read with the provisions of a second collective bargaining agreement, are made ambiguous and that an arbitrator should interpret them.

This argument fails because the Respondent is a signatory to only one collective bargaining agreement, the Elmhurst agreement, and the contract language in that agreement regarding the implementation of layoffs by seniority, is clear and ambiguous. In 2007, Respondent and the Union agreed that the terms and conditions of employment for employees hired prior to July 18, 2007 are subject to the terms listed in the agreement that the Union had with the Milk Industry Labor Association of New York ("MILA") and that terms and conditions of employees hired on or after July 18, 2007, are subject to the terms listed under an agreement negotiated directly between the parties ("Elmhurst"). Respondent is not a signatory to the MILA agreement. It is a signatory to the Elmhurst agreement. The Elmhurst agreement clearly states that layoff shall be determined by seniority and that seniority is calculated by hired date. Respondent attempts to cloud this issue by contending that the two collective bargaining agreements cover the same unit of employees. The MILA agreement, however, is not relevant to layoff and does not impact the clear language of the Elmhurst agreement. Because the

Elmhurst language is unambiguous, it need not be put before an arbitrator for interpretation.

Next, there is no provision in the collective bargaining agreement regarding COBRA. The matter cannot be deferred because there is no language in the either collective bargaining agreement concerning COBRA payments. The Complaint and Notice of Hearing alleges that Respondent failed to provide the Charging Party an opportunity to bargain about extending COBRA benefits to the laid-off employees. There is no provision in either the Elmhurst or MILA collective bargaining agreement for an arbitrator to interpret, or from to fashion a remedy. Further, both this allegation and the allegation that Respondent failed to notify and afford the Union an opportunity to bargain about lay-offs are clearly linked as they arise out of the same circumstances and conduct. Respondent's argument that they are somehow separate and "does not implicate any of the same proof" (Reply pg. 5) is untrue, as Respondent's offer of COBRA benefits flowed from Respondent's layoff of the 42 employees. Since there is no contract language regarding the Respondent extending COBRA benefits for an arbitrator to interpret, and the both that allegation and the allegation that the Respondent unlawfully laid-off employees are inextricably linked, deferral is not appropriate.

Finally, Respondent's layoff of 42 employees without notice and bargaining with the Union is a rejection of principles of the collective bargaining agreement, and therefore, this case is not well suited for arbitration. See *Oak-Cliff-Golman Banking Co.*, 207 NLRB 1063, 1064 (1973), enf'd. nom. 505 F.2d 1302 (5<sup>th</sup> Cir. 1974), cert. den. 423 US 826 (1975). (Board refused to defer allegation that employer unilaterally reduced

employees' wages because wage rate provision was a pivotal contract term, and thus repudiation of that term amounted to a repudiation of the contract.) Similarly, in the instant matter, the seniority provision of the contract is a pivotal term in the collective bargaining agreement and is a key right that unions bargain for in representing their unit members. As in *Oak Cliff*, by unilaterally laying off 42 employees out of seniority, Respondent's conduct constitutes a rejection of the principles of collective bargaining and therefore deferral is not appropriate.

#### Conclusion

For the above reasons, the allegations of the Complaint and Notice of Hearing in the above-captioned matter should not be deferred to arbitration nor should they be dismissed. Counsel for the Acting General Counsel reiterates its request that Respondent's Motion for Summary Judgment be denied in its entirety and that this matter immediately proceed to hearing before an Administrative Law Judge as set forth in the Complaint and Notice of Hearing.

Dated January 14, 2013, in Brooklyn, New York.

Respectfully submitted, >

Henry J. Powell

Counsel for the Acting General Counsel

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National Labor Relations Board

Region 29

Two MetroTech Center North, 5<sup>th</sup> Floor

Brooklyn, New York 11201

### FAMERICA R RELATIONS BOARD

UNITED STAT BEFORE THE NATIONAL REG	
ELMHURST DAIRY, INC.	
Charged Party	
and	
MILK WAGON DRIVERS AND DAIRY EMPLOYEES, LOCAL 584, INTERNATIO BROTHERHOOD OF TEAMSTERS	NAL
Charging Party	
AFFIDAVIT OF SERVICE OF RESPONDI COUNSEL'S OPPOSTION TO SUMMARY I, the undersigned employee of the National Labo January 14, 2013, I served the above-entitled doc following persons, addressed to them at the following	Y <b>JUD</b> ( or Relate nument(
JAY VALENTINE, GENERAL MANAGER ELMHURST DAIRY, INC. 155-25 STYLER RD JAMAICA, NY 11433-1506	
DODERT A DODEN ATTORNEY	17. D

Case 29-CA-090017

### REPLY TO ACTING GENERAL GEMENT

tions Board, state under oath that on s) by post-paid regular mail upon the ddresses:

JAY VALENTINE, GENERAL MANAGER ELMHURST DAIRY, INC. 155-25 STYLER RD JAMAICA, NY 11433-1506	
ROBERT A. DOREN, ATTORNEY BOND SCHOENECK AND KING 40 FOUNTAIN PLZ STE 600 BUFFALO, NY 14202-2223	Via Electronic mail and regular mail
STEPHEN H. KAHN, ATTORNEY KAHN OPTON, LLP I PARKER PLZ FORT LEE, NJ 07024-2920	Via Electronic mail and regular mail
MILK WAGON DRIVERS AND DAIRY EMPLOYEES, LOCAL 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS 73 HUDSON ST NEW YORK, NY 10013-2870	JOHN T. DRISCOLL, ATTORNEY 300 E 42ND ST NEW YORK, NY 10017-5907

January 14, 2013	Linette Gayle-Banks, Designated Agent of NLRB,
Date	Mame Mame Mark
	Signature